No. 16367

United States Court of Appeals
For the Ninth Circuit

Arthur A. Arnhold, *et al.*, *Appellants*,

vs.

United States of America; Port Angeles & Western Railway Company, Inc., a Delaware corporation; Fibreboard Products, Inc., a Delaware corporation, and A. R. Truax, Trustee in Reorganization, *Appellees.*

Appeal from the United States District Court for the Western District of Washington, Northern Division

Honorable George H. Boldt, *Judge*

BRIEF OF APPELLEE FIBREBOARD PRODUCTS, INC.

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FILED
FEB 29 1960
FRANK H. SCHMID, CLERK

The Argus Press, Seattle

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ARTHUR A. ARNHOLD, *et al.*, *Appellants*,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE FIBREBOARD PRODUCTS, INC.

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United States Court of Appeals
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ARTHUR A. ARNHOLD, *et al.*, *Appellants,* vs. UNITED STATES OF AMERICA; PORT ANGELES & WESTERN RAILWAY COMPANY, INC., a Delaware corporation; FIBREBOARD PRODUCTS, INC., a Delaware corporation, and A. R. TRUAX, Trustee in Reorganization, *Appellees.*	No. 16367

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE
FIBREBOARD PRODUCTS, INC.

JURISDICTION

Jurisdiction of the court as to Fibreboard, Inc. is derived from 28 U.S.C. 1332 *Diversity of Citizenship* (R. 354).

QUESTIONS INVOLVED AS TO APPELLEE FIBREBOARD

1. Was the defendant Fibreboard negligent in relying on fire fighting action of the Forest Service and in failing to take independent action in fighting the August 6, 1951, fire and in failing to supplement such ac-

tion in confining and suppressing the fire after it reached Fibreboard land?

2. Was Fibreboard negligent in failing to abate or procure clearance certificates for logging slash in a Fibreboard area logged in 1946 and 1947 through which the fire of September 20, 1951, burned before going onto the plaintiffs' lands and property?

3. Was any claimed negligent act or omission of Fibreboard a contributing, proximate cause of the Forks fire of September 20, 1951?

The trial court disposed of the first two questions by its memorandum decision (R. 188) and specifically in its original finding XIV (R. 212) and its identical amended finding XV (R. 234). It found that "plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs" (R. 234).

Having found no negligence on the part of Fibreboard, no specific finding was made on the question of whether any alleged act or omission of Fibreboard could have been the proximate cause of the September 20th fire.

The court did find in amended finding XVIII that "the sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951."

STATEMENT OF THE CASE

This appellee generally accepts appellant Arnholds' statement of the case, subject to certain corrections and modifications. While Ranger Floe had called Fibreboard's timekeeper at Camp No. 1 and asked him to tell the PAW crew to return the engine to the fire sighted at 12:30 (Tr. 535, 536, 537) there is no evidence that Fibreboard knew or had any reason to know of the Heckleville fire until Floe called Fibreboard at 2:40 p.m. on August 6 for men and equipment from Fibreboard (Tr. 565). At all times subsequent to the request made by Floe for men and equipment from Fibreboard on August 6, Fibreboard did everything Forest Service asked of it and made it clear that regardless of "who paid," Fibreboard was at the command of the Forest Service (Tr. 889, 890). Fibreboard was "most cooperative" (Tr. 4070). The following statement on page 13 of appellants' brief should be modified and corrected:

> "The fire escaped first into slash on the Government's land (Tr. 3527) and then into slash on Fibreboard's land" (Tr. 2011, 2012).

Actually there was a 1500-foot strip of 65-year-old, green timber on Fibreboard land adjacent to the slash on the Government's property from which the fire spread onto Fibreboard's land (Tr. 2012, 3477, 4488). Fibreboard's holdings in the 1600-acre area in addition to the strip of green timber above mentioned, consisted of some burned and cleared acreage as well as some unburned area. Some of this area had been previously burned in 1938 and 1945 by uncontrolled slash

fires. These fires had been suggested by the governmental agencies (Tr. 2088).

On page 14 of appellants' brief, Amended Finding XV is referred to (R. 234, 235) as being a finding that Floe and his subordinates were in some respects remiss in connection with the Heckleville fire. Actually Amended Finding XV referred to, is identical with Finding XIV, both of which provided that there was no negligence of any kind on the part of Fibreboard. Fibreboard cannot adopt the statement made on that page that there was evidence that Floe was negligent in the manner asserted.

We also challenge the statement on page 17 that the September fire "spread first into the three quarter sections of Fibreboard slash south and west of L-1." There is substantial evidence that the September 20 fire first started burning at a point outside of the 1600-acre area approximately 400 feet to the northeast of L-1. Certificates of clearance had been issued covering this area. It was grown up with small green timber (Tr. 4300, 4443, 4444, 4513).

FIBREBOARD'S SUPPLEMENTAL STATEMENT OF THE CASE

Two cases have been consolidated for the purpose of trial and appeal (Tr. 2084, 2085). Fibreboard is an additional defendant in the *Arnhold* case only. These plaintiffs claim that Fibreboard was negligent in relying on the fire-fighting action of the Forest Service and in failing to supplement the action of the Forest Service by independent action as distinguished from

the "full cooperation" extended to the Forest Service by Fibreboard at all times pertinent to this inquiry. This cooperation consisted of the furnishing of men and equipment requested by the Forest Service. Plaintiffs Arnhold refer to certain alleged independent action taken by Fibreboard, but claim that Fibreboard should have taken more independent action. This claim is made regardless of the fact that Fibreboard was conducting itself in a manner consistent with the fact that the Forest Service had assumed control of all fire-fighting activities (Tr. 636, 889, 890).

By 5:00 p.m. on August 6, two Fibreboard bulldozers were on the Heckleville fire which had been requested by the Forest Service. On the morning of August 7, 1951, all of the Fibreboard's logging crew, who had been logging on the early morning shift because of dry weather conditions, went to work on the fire under supervision of the Forest Service (Tr. 886).

Fibreboard's conduct and cooperation from August 6 to September 20 was approved and highly commended by the Forest Service at the time of the trial (Tr. 4074-4079).

SUMMARY OF ARGUMENT

First: There is no common law duty imposed upon Fibreboard for alleged failure to fight a fire spreading upon its land from the land of another. Under common law, a landowner in the position of Fibreboard is not liable to third parties for failure to fight such a fire.

Second: RCW 76.04.380 providing that the owner of

land "on which a fire exists shall make every reasonable effort to control and extinguish such fire immediately after receipt of written notice to do so from the warden or ranger" was not operative as Fibreboard never received such a written notice.

THIRD: Fibreboard did make "every reasonable effort to control and extinguish" the fire that came upon its lands by fully cooperating with the Forest Service professional firefighters.

FOURTH: RCW 76.04.370 and RCW 76.04.450 and other Washington fire-fighting slash statutes found in RCW Title 76; Chapter 76.04 pertaining to logging debris, set up no standards of care and create no civil liability. The penalty provided is reimbursement to the State for expense incurred by it in fire-fighting activities.

FIFTH: The trial court's finding that Fibreboard did not violate the fire-fighting statutes was proper.

SIXTH: The trial court's findings that the "sole proximate cause of the damages to the plaintiffs . . . was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951," is equivalent to a specific finding that the presence of slash on Fibreboard land was not the proximate cause of the plaintiffs' damages.

SEVENTH: Even if it be assumed for the purpose of argument, as contended by appellants Arnhold, that RCW 76.04.370 the "Abatement of fire hazards—Recovery of cost" statute and RCW 76.04.450 the "Olym-

pic Peninsula area protection" statute "impose standards of care, the violation of which is negligence *per se*" (Appellants Arnhold's brief, page 56), such an alleged violation was not the proximate cause of the fire of September 20, 1951.

The trial court so found and its finding is supported by the preponderance of the evidence.

ARGUMENT

Prior to the trial "at the instance of counsel for all parties and in their company, the court made an extensive two-day tour of the entire area of the fire, visiting and inspecting every place of particular significance later referred to in the evidence" (R. 172-173). After many weeks of trial, during which over 4,600 pages of testimony were taken, Judge Boldt took the cases under advisement and "spent hours and days wandering over these cases and over the transcript and over the circumstances of this case and I had the maps laid out in my library for weeks on end examining this situation" (R. 282). In the memorandum decision that followed, the court took the unvarying position that "the evidence does not support a finding of negligence in any particular . . ." in connection with the plaintiffs' claim that Fibreboard was negligent in relying on the firefighting activities of the Forest Service. It also refers to the plaintiffs' claim that Fibreboard should have taken independent action and thus supplemented the activities of the Forest Service.

The court called attention to the fact that it had

found the Forest Service negligent in its firefighting action during the initial period, August 6-10, in which interval the fire reached Fibreboard's lands and further stated, "It does not appear that a reasonably prudent land owner in the situation of Fibreboard under the same or similar circumstances would have recognized the inadequacies of the Forest Service's action or if so, that such land owner exercising reasonable care would have felt authorized or obliged to intervene and to interfere in any particular with the Forest Service's supervision and control of the firefighting" (R. 189).

Although the court in the memorandum decision referred to the negligence of the Forest Service as being from August 6 to 10, the court subsequently entered Amended Finding XVII, finding that the plaintiffs did not show "that defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7 . . ." (R. 235). Thus it would appear that if Fibreboard was to have recognized the inadequacies of the Forest Service, it would have been forced to do so on August 6 and 7, the dates that the fire was being fought on railroad and government lands, when the fire was active and when it was, as it was at all times, under the complete command and control of the Forest Service. To hold that Fibreboard should have recognized any so-called inadequacies of the Forest Service at that time, or any other time, and should have intervened, would have called for a finding wholly unsupported by the evidence.

In disposing of the plaintiffs' claim that Fibreboard was negligent in not disposing of the slash on its lands

in the vicinity of the 1600-acre tract or in the alternative procuring State clearance certificates on such slashed lands, the court stated that "under the circumstances, indisputably shown by the evidence," such a finding of negligence in that regard could not be made. The court further commented that it could not adopt the plaintiffs' contention that under the Washington statutes a landowner in the position of Fibreboard "is absolutely liable irrespective of negligence or damage to other landowners caused by fire emanating from, even though not originating on, such slashed land." The court further commented that in its opinion the Washington State Legislature in enacting the fire fighting statutes relied on by the plaintiffs Arnhold did not intend to provide "for absolute liability of the owner of land containing logging slash under the particular circumstances" of a landowner in Fibreboard's position.

However, appellants Arnhold on page 56 of their brief state that the rule of liability to be applied is not one of liability without fault but the liability of conduct proscribed by statute. They further state that the statutes impose standards of care, the violation of which is negligence *per se*. We submit that there are no standards of care set up by the statutes. They are penal in form; and the penalty is the reimbursement by the landowners of the expenses of the State incurred by it in fighting the fires. The statutes further provide the method of the State's recovering the expenditures thus incurred.

> *State v. Canyon Lumber Corp.*, 46 Wn.(2d) 701, 284 P.(2d) 316.

As pointed out by this court in *Arnhold v. United States,* 225 F.(2d) 649:

> "No liability is placed on the landowner, with or without written notice to third parties where public fire fighters take inadequate measures in their attempt to subdue the blaze."

The trial court, as indicated in its memorandum decision and finding in behalf of Fibreboard, refused to take the position that these statutes fixed an absolute liability on the landowner. Reasonableness of the conduct of Fibreboard was amply supported by the evidence. Even under the theory advanced by appellants Arnhold on page 56 of their brief that the liability is for conduct proscribed by statute and that the violation thereof is negligence *per se,* the landowner would have a right to show the reasonableness of his conduct. However, it is clear that the Washington legislature did not mean to create a civil liability by enacting the fire fighting statutes referred to.

But even if we assume for the purpose of this argument that there was a violation of the slash statute by leaving unburned slash on this appellee's lands and that such violation was negligence *per se* as contended by appellants Arnhold, there was still no showing that such a claimed violation was the proximate cause of the fire of September 20. It is a well-established rule in Washington that although the violation of a positive statute may be negligence, there can be no liability because of such negligence unless the violation of a positive statute or ordinance is the proximate cause of the plaintiffs'

injuries. As was said in *Berry v. Farmers Exchange of Walla Walla,* 156 Wash. 65, 286 Pac. 46:

> "That violation of an ordinance, generally speaking, is negligence, there can be no dispute, but the law is well settled that there must be a causal connection between the negligence arising from the violation of the ordinance and the accident itself, before a cause of action arises from such violation." (Citing cases)

The *Berry* case involved the violation of a city ordinance requiring fire escapes on apartment houses.

It should be noted that the trial court at all times took the unvarying position that there was no liability so far as Fibreboard was concerned. Its memorandum decision so far as alleged Fibreboard liability is concerned was never changed or altered. Its finding that Fibreboard was in no manner negligent was never changed or altered except by number which was occasioned by the filing of the amended findings pertaining to other defendants. The validity and soundness of the court's firm position that there was no liability shown on Fibreboard may have been reflected by comment of one of appellants' counsel during one of the post-trial arguments when he said: "I know Your Honor has given this matter a whole lot of thought and for that reason I am not going into this Fibreboard situation at all. You found no negligence there and I don't want to waste your time raising it" (R. 286). The validity of the court's position as to the non-liability of Fibreboard and particularly referring to whether or not it should have recognized any alleged inadequacies of the Forest

Service on August 6th and 7th is again reflected in the court's memorandum decision where it said: "During the course of the fire fighting, both on the right of way and thereafter, a number of highly competent and experienced forest fire fighters were on the scene as participants or observers. There is no evidence that at any time during the long battle any of these experts or any representatives of any plaintiff or anyone else interested in protecting life and property then in jeopardy either condemned, criticized or offered suggestions concerning means or method used in fighting the fire" (R. 188). Even during the trial in ruling on Fibreboard's motion to dismiss at the close of the plaintiffs' case, the court said: "Well, I must say that the motion certainly presents very serious questions which, of course, have crossed my mind as the case progressed . . . " "It seems to me that in the circumstances of this particular case the best interests of all concerned will be if I more fully hear all that is to be said on this subject when all of the evidence on liability has been submitted. Accordingly, the motion will be denied . . . " (Tr. 3258, 3259).

In referring to the duties of the landowner on whose land the fire of August 6 started, the trial court said:

> "As indicated in the applicable principle of law earlier stated herein, with knowledge of a fire on its right of way, whether caused by its engine or not, PAW had the duty to exercise reasonable care to confine and suppress the fire. However, if it appeared to PAW in the exercise of reasonable care that experienced, competent fire fighters were in charge of the fire and apparently taking every reasonable measure to confine and suppress the

> fire, the mere fact, long later determined, that the fire fighting was inadequately or imprudently performed, would not justify finding PAW negligent." (R. 188)

Obviously, this statement or principle applies with equal or greater force to Fibreboard on whose land the fire spread as compared to appellee PAW upon whose land the fire originated.

What, If Any Common Law or Statutory Duty Was There on Fibreboard Upon Whose Land the Fire Spread?

Fibreboard was not responsible for the start of the August 6 Heckleville fire and was not responsible for its spread onto its portion of the 1600-acre tract. We, like this court, in *Rayonier, Inc. v. United States,* 225 F.(2d) 642, have been unable to find a decision holding a landowner liable for the spread of a fire which did not originate on its property. In that case this court said:

> ". . . We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. Cases cited by appellant deal with the duties of a landowner on whose property the fire broke out. To hold an intermediate landowner liable for damage to property caused by fire passing over his land to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

A simliar statement was made in *Capra v. Phillips Ins. Co.,* 302 S.W.(2d) 324, in connection with a fire

which commenced on the plaintiff's land. That court pointed to the fact that no case was cited by the plaintiff which holds a defendant liable for a fire originating on the plaintiff's land. It is significant that with the numerous decisions on forest fires that no decision is pointed up basing liability for the spread of a fire originating outside the landowner's property. Most if not all of the decisions concerning liability for spread of fire are found in the following annotations:

21 L.R.A. 255;
42 A.L.R. 783;
111 A.L.R. 1140;
18 A.L.R.(2d) 1081.

Fibreboard Received No Notice to Make Reasonable Effort to Control Fire That Spread Onto Its Lands As Required by R.C.W. 76.04.380

Washington statute RCW 76.04.380 declares an uncontrolled fire and one without proper action being taken to prevent its spread is a public nuisance. The statute then provides that the owner of land "on which a fire exists . . . shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the warden or ranger." If the landowner does not proceed to abate the nuisance, then the fire warden does so at the expense of the landowner. Payment of the forest patrol assessment relieves the landowner of any responsibility under this statute unless he is guilty of negligence in the starting of the fire or there is "extra debris" as defined in the slash statute. We submit that this statute

does not give rise to a civil liability. If it does, then the duty is to make "reasonable effort to control and extinguish" after notice. All that the statute requires of the landowner in abating this nuisance is to "make every reasonable effort" as requested by the fire warden and where the fire is "uncontrolled and without proper action being taken to prevent its spread." The penalty imposed by the statute is the assessment of the cost incurred by the fire warden or forest ranger in abating the fire. The payment of 8¢ an acre forest patrol, fire protection assessments referred to in the statute had been made by Fibreboard (Tr. 3502).

If proper care of the fire is being taken by the Forest Service, then certainly there is no other duty imposed by the statute. At most, this duty is simply reasonable care under the circumstances and is not an absolute liability. It follows that the statutory obligation, if there is one, gives rise to nothing greater than common law if there is a common law duty. This state is committed to the rule of law that where a fire starts on the property of a landowner he must exercise care to prevent its spread.

> *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200.

As previously pointed out and as stated by this court in *Arnhold v. United States*, 225 F.(2d) 649, this rule does not extend to a landowner such as Fibreboard upon whose property the fire has spread. ~~Remington's Revised Statute~~ 76.04.380 does not change the common law so as to impose liability upon a landowner upon whose land the fire spread. The duty of making every

reasonable effort to control and extinguish such fire becomes operative only "after receiving written notice to do so from the supervisor or a warden or ranger; . . ." Fibreboard was never served with such a written notice or request (Tr. 2300). The statute further provides a penalty on the landowner on whose land the fire spreads for failing to comply with such a notice and the penalty is recovery of costs by the public firemen from such landowner. In face of the fact that Fibreboard was never served with such a written notice, we submit there was no common law or statutory duty upon this appellee to suppress the fire that had spread upon its lands. It did, however, cooperate with the Forest Service in fighting the fire. The latter duty, if it existed, was not imposed by common law or statute in the absence of the required statutory notice.

Nevertheless, the court found in its memorandum decision and its finding was abundantly supported by the evidence, that Fibreboard did make "every reasonable effort to control and extinguish such fire."

The question then is whether or not Fibreboard used reasonable effort under the circumstances of this case to suppress the fire. Fibreboard, in fully cooperating with the Forest Service, used "every possible effort and every available man" to suppress the fire. The court's analysis of the facts in *Walters v. Mason Co. L. Co.*, 139 Wash. 265, 246 Pac. 749, applies to Fibreboard in the instant case.

> "Under all the evidence in the case, respondent, the fire wardens and even appellant himself used every possible effort and every available man to

suppress the fire. . . . Disregarding the question of whether there was an intervening cause by reason of the high wind that appears to have been blowing on Sunday forenoon, we are of the opinion that on the question of negligence this case falls within the rule of *Lehman v. Maryott and Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323, and *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031."

Like the *Walters* case, the *Stephens* case and the *Lehman* case, cited by the court, this case involved instances where the fire fighters assumed that the fire was under control.

Fibreboard's Cooperation with Highly Skilled Forest Service Fire Fighting Organization

It is apparently agreed by appellants Arnhold "that Fibreboard could not interfere with Forest Service management of the fire . . ." (Appellants Arnhold brief, page 52). Nevertheless, the question of whether or not Fibreboard should have taken action independently of the Forest Service cannot be completely divorced from the fact that its cooperation was requested and given to the Forest Service. It will be remembered that Fibreboard had no knowledge of the existence of the Heckleville fire until called by Floe at 2:40 p.m. on August 6 (Tr. 565).

Independent Action by Fibreboard

Fibreboard extinguished one fire on August 6 (Tr. 548). One of its men hauled Forest Service men to a certain junction toward the fire on August 6 (Tr. 1047).

It put in certain trails and roads during the mop-up period after discussing this with Floe (Tr. 2051 ,2052). Mr. Floe said that Fibreboard's action on August 6 was proper:

> "Q. . . . In regard to the fire of August — let's start it on August 6, I will ask you whether or not it was the general practice for a timber owner and operator such as Fibreboard at that time and place to have taken independent action to suppress or stop, extinguish the fire that started or fires that started on August 6, 1951, on the railroad right of way independent of your action? By you, I mean Forest Service action.
>
> A. No.
>
> Q. Would you tell us why? Just explain briefly if you would.
>
> A. Well, it was on government land and not immediately accessible to them. If they had seen it, perhaps, before and wondered whether it had been reported or not, they probably would call me and ask me about it, or if they could do anything, but under the circumstances, my belief, they were gone before the fire was reported, and there wouldn't be no way for them to see the fire in their ordinary route of travel.
>
> Q. And after it was reported to your office, would you expect them to conduct business in a normal and usual manner—expect Fibreboard to go out and take independent action after you had a report on it?
>
> A. No." (Tr. 4420)

Fibreboard's Action on August 6 Was Proper (Tr. 2511, 2868, 4394)

Fibreboard complied with all requests of the Forest Service and stayed on the August 6 fire "as long as needed" (Floe, Tr. 665). Mr. Floe consistently testified throughout the trial that Fibreboard cooperated fully and did everything that could have been expected of it. His testimony on this point is demonstrated as follows:

> "Q. Did . . . Fibreboard . . . tell you that in effect their organization was at your service and your command?
>
> A. Yes, they have always told me that.
>
> Q. And they did, on this occasion, during this fire?
>
> Yes.
>
> Q. It is a fact, then, I assume, that Fibreboard gave you their full and whole-hearted cooperation in fighting this fire from the very inception of the fire until the end of it, isn't that right?
>
> A. That is right." (Tr. 889-890)

Mr. Leslie Colvill, one of Mr. Floe's superiors in the Forest Service, said that Fibreboard did everything that was or could have been expected of it by the government in the following testimony, the first portion of which refers to a meeting of Fibreboard and the Forest Service concerning payment of Fibreboard's men after fire went on to its land:

> "Q. Now, as far as this meeting is concerned, I will ask you whether or not there was anything that occurred there that in any way led you to be-

lieve that Fibreboard was not perfectly willing and able to do everything in its power to co-operate with the Forest Service regardless of any discussion you may have had as to how the men would be paid or—

A. They were most co-operative.

Q. Would you tell us, please, what you mean by that, Mr. Colvill?

A. Well, first, the willingness with which they agreed to pay their men was one thing. I in my work have a lot to do with trouble shooting. I call it, and I really expected some trouble because in a case of that kind, the operators want us to take up their men, generally, on our payroll, and one of the reasons they give me is because of accidents that may occur while they are on this kind of a job. Then, of course, comes the pay scale, which is usually different, and that brings on problems.

Q. In other words, the fire-fighting scale will be lower than Fibreboard's rate?

A. Yes, so that willingness to co-operate with us without any argument at all more than that one statement pending this determination was certainly an act of willingness to co-operate. Likewise, in giving us their men, that is, placing them at our disposal, and equipment without any questions so that we had full control was cheerfully done.

Q. And I was going to say, did they actually do that, tell you that their men were at your disposal and their equipment?

A. Yes.

Q. And was it understood, sir, to the best of your knowledge, that the equipment and men of Fibre-

board were at the Forest Service's disposal and to be directed by the Forest Service?

A. To the best of my knowledge, yes.

Q. What would you say as to whether that is the proper and usual and customary procedure for a land owner or timber owner such as in Fibreboard's position at that time, whether or not that is the usual, and I guess I said customary practice to follow in that case?

A. Yes, it is the customary practice.

Q. Now, in view of the co-operative agreement and the general situation there, which I won't go through and repeat again, would it have been proper for the Fibreboard Company or any other private individual or corporation to go in and do independent things that might or might not be inconsistent with the general over-all plan of the Forest Service in connection with the suppressing and fighting of this fire?

A. I think it would have complicated the situation and made control slower and more difficult if we had to negotiate all of the various little areas in which a company might elect to want to do the work instead of us. I can't imagine a situation like that. We don't have them.

Q. It would be bad?

A. It would be bad.

Q. Now, is it a fact that the Forest Service did assume control of this fire from its inception?

A. Yes.

Q. Under that situation you feel, or do you, that Fibreboard operated properly from (the) time of the beginning of this fire on August (6)?

A. Yes.

Q. In working with the Forest Service?

A. Yes.

Q. Now, getting over to the period during the mop up and latter end of it in September there, what would you say as to whether Fibreboard acted in the usual and customary manner, in proper manner, in still keeping its tanker there at Camp One subject to the National Forest's direction and having its crew over on Tom Creek logging subject to, of course, to the Forest Service calling them if they wanted them? What would you say as to whether or not that was usual and customary and proper practice?

A. I think this was proper and customary.

Q. And what would you say, sir, as to whether or not Fibreboard would or would not have been proper had it under the circumstances, would it have been usual and customary if it had attempted to interfere and overrule, if you please, Forest Service in connection with the mop up and decisions of whether there should or should not be patrol on, say, the last week before September 19 and 20?

A. I think such action would have been improper.

Q. And why?

A. And not customary.

Q. And why would it have been improper, Mr. Colvill? Just briefly tell the Court.

A. Well, we were in charge of the fire, and we knew where we wanted action. We had the complete picture. If we wanted the tanker here, and you

boys were employing that tanker some place else, it wouldn't have been available to us, your tanker. I am referring to Fibreboard's tanker. It would have been a divided responsibility, and we could not have cooperated to the same extent. It would have changed our plans materially because our action was governed in a large measure on what Fbreboard had, and particularly their men in the proximity of their camp to the fire area. By their camp, I mean the logging operation, not the camp, but where they were logging, and so that in deciding on the number of men that we wanted to employ, we were guided in a large measure by the fact that we would—could call upon Fibreboard men, and we would have them there. It was something like 30 minutes we figured that we could have additional men, and that had a bearing, then, on our action, and the number of men we would have to employ. Now, if that cooperation was taken away from us, it would have affected our plans.

Q. Actually, now, I have asked you quite a few questions about what the contemplation was. Actually, did Fibreboard cooperate fully throughout the entire history of this fire from August 6 to September 20, and thereafter as far as that is concerned?

A. Yes, they did.

Q. To the satisfaction of the Forest Service, Mr. Colvill?

A. Yes.

Q. In that connection, what would you say as to whether or not the—or land owner within the area of this particular co-operation agreement, and I suppose others, actually has as great a knowledge and expertness in connection with fire fighting and

suppression as your own good organization? By that I mean the Forest Service.

A. In my experience, the know-how is much greater with Forest Service than it is with logging operations. Occasionally, such as the one or two men that have been mentioned at the trial that were employed by logging operations, are well qualified, but generally, that is not the case. We are better qualified by know-how, experience and fighting fire than logging companies.

Q. And does it follow that you have, of course, highly equipped scientific gadgets and information, I suppose?

A. Yes.

Q. In connection with fire fighting and suppression?

A. What we lack is caterpillars, tractors and men principally." (Tr. 4074-5-6-7-8-9)

He further testified that for Fibreboard to proceed to black out fifty feet around the perimeter of the fire independently would have led to complications:

"Q. And even though they had gone and just blacked everything out, you think that would have interfered?

A. If we were in there, too.

Q. I am assuming now that they were doing the same you were doing, trying to black out the 50 feet.

A. I think that could have led to some complications.

Q. You think it could?

A. Yes.

Q. What kind of complication? Would you explain that?

A. Yes, first, that it would have—we were dependent, too, upon their crew and their equipment, as I brought out yesterday. Now, if they were in there, and then would come the problem of who was doing what in the area to eliminate possibilities of overlap, but more serious, probably, was the division of responsibility in case something went wrong. There would have been most certainly a passing of the buck in that case.

Q. Assuming, now, that after you released the crew to go back to logging, Fibreboard elected to keep their crew on there and did actually black out the entire 50 feet around the perimeter, how would that interfere in any way with your mop up?

A. I think that it would have complicated it. Yes, I think it would have complicated it.

Q. Now, if after September 13 Fibreboard had maintained a ten-man day patrol on the 1600-acre area to look for and put out smokes, would that have interfered with your mop up and patrol?

A. Yes, I think it would have interfered and have complicated and particularly as to responsibilities." (Tr. 4206-7-8)

The record abounds with testimony that Fibreboard's action in connection with Forest Service and its so-called independent action was proper, and customary practice (Tr. 2868-4262-4394).

Mop-Up Action by Forest Service After August 7

The preponderance of the evidence points up the fact that the action taken by the Forest Service after August 7, the date upon which the fire spread to Fibreboard's land, was in all respects proper. It followed a well-established practice and procedure (Tr. 910). For example, it completely blacked out a 50-foot strip on the perimeter of the 1600-acre area (Tr. 1101).

Robert Young, employee of appellant Rayonier, was a sector boss during the mop-up action until August 11. He said that when he left on that date: "The fire was in good shape" (Tr. 1668). You could drive through the 1600-acre area some days in September prior to the 19th and see no smokes at all (Evans, Tr. 1329). No smokes were seen in the 1600-acre area for five days immediately prior to September 19 except at L-1, L-2 and one other place (Tr. 1618). There was no flare-up in L-1 on September 13 (Tr. 1330). L-1 was cleared better than average (Tr. 641).

As pointed out by the trial court in its memorandum decision, it is impossible to find and put out every last fire smoldering in buried roots and logs. This is particularly true in areas of this proportion and in rugged terrain in which the 1600-acre area was contained (R. 198). Again, the evidence was substantial and we submit preponderated in favor of the finding that there was no negligence on the part of the Forest Service in failing to maintain a night patrol on the 1600-acre area or in the number of men and amount of equipment used in the mop-up. Mr. J. LeRoy MacDonald categorically

stated that it was not imprudent under the circumstances existing at the time to refrain from having a patrol on the night of September 19; that the State of Washington which he represented would not have maintained a patrol on the area if this burned-over tract had been in its jurisdiction (Tr. 1775). There is also substantial testimony that such a patrol would have been ineffective in any event (Tr. 1599, 2490, 2823). At the time of this incident it was good practice and was actually the practice of fire fighting organizations to get out of the woods at night with their crew under the circumstances existing at the 1600-acre tract on the night of September 19 (MacDonald, Tr. 1770). Fibreboard would have interfered with Forest Service action by putting a patrol on the burned-over area on or after September 13 (Tr. 4208). Fibreboard did not know and had no reason to know that the lookout at the North Point lookout station had left the station and traveled to Snider Ranger Station on the night of September 19 (Tr. 4480). Certainly it cannot be seriously contended that Fibreboard should have stepped in and overruled the Forest Service or supplemented its mop-up activities by independent action on its part. In addition to State Warden MacDonald, other expert witnesses testified to the same effect. If Fibreboard were to be held negligent under such circumstances, it would mean that it was being expected to know more than the experts and the professional fire fighters. The Forest Service to whom the Fibreboard Company looked for service, protection and advice in fighting fires was in full control of the situation. Fibreboard, acting as a

prudent landowner upon whose lands the fire had spread, had a right to rely upon the judgment of these professional fire fighters.

Proximate Cause of September 20 Fire Was Wind and Weather Conditions

In Amended Finding XVIII, the court specifically found that:

> "The sole, proximate cause of the damages to plaintiffs . . . was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." (R. 235, 236)

There is no dispute that the season of 1951 was unusually dry. On the morning of September 20 anything in the woods would burn (Tr. 907). Fire could start and burn in any timber area under conditions existing on September 20 (Tr. 1605). Fire could have started in slash, burned-over slash or green timber on the morning of September 20. Fire was just as apt to ignite in burned-over slash as in unburned slash, "maybe a little more so" (Tr. 4090; Colvill, Tr. 4098). Mr. Pearson, Fibreboard logging superintendent, testified that on the morning of September 20 it was the hardest wind he had ever "seen" at that time or in that area where he had spent many years; that gravel was being blown so as to hit his tin hat (Tr. 2104). It was the worst fire day ever witnessed by witness Carl H. Russell, District Supervisor of Olympic Peninsula for the State of Washington in 1951, since "a fire day" that he recalled when he was on the Skagit in western Washington in 1913 (Tr. 4401). It was common knowldege that many

fires went out of control in western Washington on September 20 (Tr. 1438).

Obviously, the court's finding that the fortuitous combination of wind and weather caused the fire and the resulting damages is amply supported by the evidence.

Defendant Fibreboard Followed the Usual and Customary Practice in Suppressing the Fire Which Came Upon Its Lands Where Forest Service Had Control and Responsibility of the Fire

There was little, if any, dispute in the testimony that the conduct of Fibreboard during the time elapsing after August 7, the day the fire spread upon its land, and September 20, the date of the Forks fire, was in accordance with established practice and custom under the circumstances then and there existing. The usual practice under such conditions is to rely upon the wardens or fire rangers who take control and to cooperate with them. While usual practice is not conclusive of due care, it is good evidence to support a finding of due care.

In *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031, the court said:

> "The appellant had used such precautions in the operation of his camp as are usually employed by those engaged in the logging business."

In *Silver Falls Timber Co. v. Eastern & Western Lumber Co.*, 40 P.(2d) 703 (Ore.), the court quoting from a Utah case said:

> "While it is true that the word usage, usual, custom or ordinary is used, yet it is quite apparent that the only object of the inquiry was to inform the jury as to the ordinary manner in which such work is performed and from such testimony determine whether or not defendants were or were not guilty of negligence."

The court further quoting from an earlier Oregon case said:

> "When there is no absolute standard of care fixed by law, evidence of what is usual is often of value in assisting a court or jury in determining the issues on a charge of negligence."

Appellants Arnholds' Authorities on Alleged Duty or Right of Landowner to Supplement Forest Service Fire Fighting Organization

On page 54 of appellants' brief, *Galbraith v. Wheeler-Osgood Co.,* 123 Wash. 229, 212 Pac. 174, is cited as authority for the proposition that a landowner has a right to "take precautions in addition to those prescribed by the forester" if he thinks the forester's precautions inadequate. In the instant case Fibreboard did not think that the forester's precautions were inadequate and had no reason to question its fire fighting activities (Tr. 4515). *Wood & Iverson, Inc. v. Northwest Lumber Co.,* 141 Wash. 534, 208 and 252 Pac. 98 (*en banc*), is also cited in support of this proposition.

In the *Galbraith* case the fire warden was employed by the defendant and acted in his "individual and not in his official capacity." This arrangement was clearly understood by the parties before the warden was em-

ployed. The forester wrote the defendant prior to the burning and said: "You understand that fire wardens do not go on duty for the State before June 1st so he is at liberty to attend any matter of this kind for private parties." The case distinguished the instance where the abatement was done by the Forestry Department and stated in that instance: "It may be . . . he could not be chargeable for the losses caused by the act of the state forester."

The *Wood & Iverson* case predicated liability on the landowner because of his failure to cut snags in accordance with the statutory mandate which required the removal of "all dry snags, stubs and dead trees over 25 feet in height before undertaking any slash burning." The court said that the duty prescribed by the statute to cut snags was not discretionary on the part of the department or the landowner. This case, like the *Galbraith* case, involved slash fires that went out of control after they were started.

In *State v. Gourly,* 209 Ore. 363, 305 P.(2d) 396, the State sued to collect an assessment for the cost incurred in fighting a fire. The fire started on lands belonging to defendant Empire. The fire did not spread onto defendant's land from the land of another but started in the logging area which had been assigned to Gourly Bros. by Empire for logging operations. The court simply held that it was a question for the jury whether or not every reasonable effort to control the fire had been taken and that "the statutory or contractual duties of others than the defendants and the extent of their efforts made in performance of such duties so far as known to de-

fendants or so far as they should have been known to them would be matters for the consideration of the jury in deciding whether under all the circumstances the defendants severally made every reasonable effort to control the fire."

In the instant case, we have a fact finding based upon substantial evidence that every reasonable effort was made to control the fire and that Fibreboard could not have been expected to recognize any so-called inadequacy of the Forest Service on August 6 and 7, or at any time.

The three foregoing cases relied upon by appellants Arnhold lend no credence to the contention that Fibreboard had any duty to supplement the Forest Service action beyond the cooperation which it actually extended to that organization.

Washington Fire Fighting Slash Statutes

The trial court did not in its findings or amended findings specifically refer to the charge made against Fibreboard concerning the slash on Section 31 adjacent to the 16,00-acre burned area. It disposed of all of the charges against Fibreboard in its amended finding, XV (R. 234), in which it said: "Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs."

In its memorandum decision it said:

> "Under the circumstances, indisputably shown by the evidence, a finding of negligence on the part

of Fibreboard in not disposing of the slash on its lands in the vicinity of the 1,600 acre tract or in the alternative, procuring state clearance certificate on such slashed lands, is not justified and has not been made." (R. 189)

The court went on to state that plaintiffs Arnhold contend that under the Washington statutes the owner of land containing logging slash, absent certificate of clearance thereof by the State Supervisor of Forestry, is absolutely liable for damage to other land owners "caused by fire emanating from, even though not originating on, such slashed land" (R. 189, 190).

The court then concluded that although the Washington Supreme Court has not passed on the latter question, that the Washington State Legislature in enacting the slashed statutes did not intend to impose absolute liability (R. 191).

Appellants in their brief at page 56 now state that the rule of liability to be applied is not one of liability without fault, but that the statutes impose standards of care, the violation of which is negligence *per se*. Nevertheless these appellants apparently take the position that the mere presence of unburned slash under the circumstances referred to by the trial court in its memorandum decision impose liability. On page 56 of appellant Arnholds' brief it is stated that "it may be true, as contended by Fibreboard, that it is 'common practice among timber owners and operators not to burn logging debris unless it presents an unusually hazardous situation and unless required to do so by the State Fire Warden or State Forest Ranger (R. 400)'." It is obvious

that it not only may be true but was established by a preponderance of the evidence that it was not only common practice to refrain from burning logging debris on the Olympic Peninsula, but that it would be negligence in most instances to burn slash. Under circumstances similar to those with which Fibreboard was confronted by the slash in the North Half of the South Half of Section 31, it would be risky to burn (Tr. 4095-2524). To hold that the mere presence of slash on the Fibreboard lands referred to gave rise to a cause of action in negligence for civil liability would defeat the very purpose of the Legislative Fire Fighting Statutes, which is to preserve the forests. It would force land owners to burn. If they did not burn it would force the "Supervisor" to "summarily cause it to be abated" and charge the cost of abating and burning to the land owner. RCW 76.04-.370. The foregoing statute refers to slash as a fire hazard. It provides that the Supervisor may give the land owner notice under certain circumstances and assess the cost of burning the slash to the land owner if he refuses to abate the slash after receiving the notice. Fibreboard had never been served with notice or requested to abate the slash on Section 31 (Tr. 500). It refrained from burning this slash, first, for the reason that Fibreboard followed the general policy of not burning unless requested to do so; second, for the reason that it was more dangerous to burn this particular slash than to allow it to deteriorate; and third, the slash was located in an area away from highways and the general public where the risk of fire is greatest (Tr. 2088).

Some of the reasons for the danger that would have

been involved in burning the slash included the fact that adjacent to the three 40's in Section 31 referred to in the record was state and government land containing unfelled snags (Tr. 4433-894).

Slash Statutes Set Up No Standard of Care and Create No Civil Liability

The Fire Fighting Statute RCW 76.04.370 above referred to was amended in 1929 (Laws of 1929, Chapter 134, Section 1, Page 351). The deleting of the word "nuisance" in this statute when it was amended in 1929 is important. The present statute refers to slash only as a fire hazard and not as a nuisance. No civil liability is provided. This statute, as well as the other provisions found in RCW Title 76, Chapter 76.04 under the heading "Forest Protection," are merely penal in nature. The Legislature obviously refrained from setting up standards of care so far as the land owner is concerned but placed that in the Supervisor. The Washington Supreme Court has said:

> "The sanction imposed, in the event of failure to remove (slash) is liability for fire fighting cost made necessary by reason of such hazard."
>
> *State v. Canyon Lumber Corp.,* 46 Wn.(2d) 701, 284 P.(2d) 316.

In the *Canyon Lumber* case the state brought an action to recover for fire fighting costs "incurred by the Division of Forestry in suppressing a 6,000 acre forest fire which occurred in Whatcom County, Washington, in September, 1951." The court held that the complaint was good as against the demurrer which had been sus-

tained by the lower court on the theory that the statutes were unconstitutional. It further held that the state's allegation that the slash conditions necessitated the fire fighting expense was good as against demurrer.

History of Forestry Laws of the State of Washington

In this case the supervision of fighting the fire was taken over by the forestry personnel, both Federal and State. Since the claim of liability on the part of Fibreboard is predicated upon the State's statutes, we submit that these statutes relieve Fibreboard of any responsibility for supervision. As already indicated, the statutory provisions prior to 1929 specified what the landowner was to do on his own responsibility and judgment. The one exception was the snag statute which specified that snags over 25 feet should be removed. Otherwise, the provisions were mostly of reasonable judgment on the part of the landowner.

The modern statute puts the supervision in the supervisor and wardens appointed by the Director of Conservation and Development RCW 76.04.010. The wardens police the forest RCW 76.04.070. The Director of the Department designates the hazardous fire area RCW 76.04.150. The Supervisor issues permits for fires in the closed season and directs how, when and where the fire shall be made RCW 76.04.150, 160, 170. The safety requirements for machinery is put under the supervision of this Department RCW 76.04.250, 260. The Supervisor may abate hazard at landowner's expense RCW 76.04.370.

Great stress is put on the fire patrol assessments and

the provisions of the statute declare the standard of care to be that of the Forestry Department. For instance, in RCW 76.04.170, compliance with the terms of a burning permit "shall constitute and be deemed the exercise of care of a prudent and careful man with respect to the starting and control of such fire." Here is a definite statement that the judgment of the wardens or rangers granting the permit shall be the standard of care required.

Specifying the duties of wardens, RCW 76.04.070, the wardens are required to investigate all fires, set the back fires to control fires and "summon, impress and employ help in controlling fire." By impressing the employees of Fibreboard into their fire fighting ranks, the Department assumes the responsibility for the abatement of the fire, a duty particularly proscribed for "uncontrolled fire" in RCW 76.04.380. The whole philosophy of the present forestry laws and slash statutes is entirely contrary to the old philosophy placing the responsibility of judgment on the shoulders of the landowner. The philosophy of the present law is that the public officials take care of the forest and supervise any fire fighting necessary. Under the present statutes the standard of due care is prescribed to be the judgment of the Supervisor. The statute with reference to the forest of the Olympic Peninsula, RCW 76.04.450, does not establish any specific standard of care but recognizes that there is a "fire hazard caused by reason of the unusual quantity of fallen timber upon such land," and the following statute, RCW 76.04.460, provides that: "The director through the Division of Forestry shall promulgate rules

and regulations for the protection of the forest and timber situated upon the land described in RCW 76.04-.450 from damage or destruction by fire." The following statute RCW 76.04.470 even provides that "such rules and regulations or amendments thereto shall be promulgated by publication. . . ."

If Fibreboard had attempted to burn the slash in question, it is obvious from the preponderance of the evidence that it would have exposed the forest to the hazard of fire. If Fibreboard had decided to take the chance of burning the slash in Section 31 during the closed season, it would have been required under RCW 76.04.170 to obtain a permit from the Supervisor, Warden or Ranger so to do. We submit that it is doubtful that such a permit would have been issued in view of the location of the slash and the fact, as reflected by the testimony, that the State and Forest Service were both hesitant to burn slash under these conditions. Doubtless this fact explains the undisputed testimony in the case that practically all landowners or persons in possession had unburned slash on their land prior to the September 20 fire. This is true as to the State, the Government, and appellant Rayonier as well as others. It also accounts for the fact, established by the evidence, that most if not all landowners and operators in the area in question followed the policy of not burning slash on the Olympic Peninsula (Tr. 4473). The record abounds with testimony that prudent landowners and operators did not burn slash on the Olympic Peninsula. Fibreboard's Logging Superintendent, Mr. Petrus Pearson, when asked "Why didn't you burn the slash in these

three 40's on Section 31," submitted the following reasons:

"A. Well, there is more than one reason.

Q. All right. Let's have them all at one time.

A. The first reason is that with present utilization of timber the slash burning becomes less and less important. More of the trees are used, and there is lots less residue on the ground.

Another reason for not burning slash is that that was all a closed area. We had a gate across our road. It wasn't open to the public excepting we opened it during the hunting season if the weather permitted.

Q. By that, let me interrupt you, what do you mean?

A. We had a cable across the bridge there. In fact, the first people up there after the fire started had to cut the cable.

Q. Does it make a difference if you have got a slash area, say, along the highway where people might be throwing cigarettes or something?

A. Oh, yes.

Q. Is that what you mean?

A. Yes. Another reason, we felt that that area was well protected by a broad band of cleared area that had been some of the burn in '38, some slash burn, and also, the last band was what we slash burned in 1945, which isolated the actual slash up there.

Another reason for not burning it, burning slash, there is a question in my mind whether slash burning helps too much in forest fires at any rate. This fire traveled just as fast very nearly, in the area that had been slash burned and cleared as in areas

that had slash on it. There seemed to be very little difference. But at any rate, burning slash in an area up against those snags, you would almost have to fall those bigger snags like that or else you would probably be fighting the fire the next year also.

Q. Now, these snags that you mentioned were on government land and on State of Washington land, is that right?

A. That's right." (Tr. 2088-2089)

The United States and the State of Washington both used their discretion and decided if, when, and where to burn slash (Tr. 398-413). Warning and notice would be given private operators at the discretion of the foresters if slash on private lands appeared too dangerous (Tr. 414). The weighing of the danger of slash burning obviously went into the consideration by the authorities as to whether to request a private operator to burn. "Slash burning is a hazardous occupation" (Floe, Tr. 895). Unburned slash was left on some government lands rather than to take chances of burning (Tr. 501). Judgment must be exercised in all cases as to whether to burn or not to burn slash (Tr. 787-802-896). There are circumstances in which there would be as much or more hazard in burning as in not burning (Floe, Tr. 787). It is always dangerous to burn near snag areas (Cowan, Tr. 2524). It would have been risky to burn slash in Section 31 (Colvill, Tr. 4095).

There is less slash burning than in prior years. In response to a question by the trial court, Mr. Floe testified:

"THE COURT: Well, is the net result of the whole

business that there is actually less slash burning done?

THE WITNESS: That is true."

Robert Cunningham, logging superintendent for appellant Rayonier, had never burned slash either as an individual or as a Rayonier man. "We didn't believe in burning slash" (Tr. 1916). In relating the fact that Rayonier does not burn slash, he said:

"Q. You have been with Rayonier, you say, since 1945?

A. That is true.

Q. Do you, as a Rayonier man or individually, burn slash at all in the Olympic Peninsula?

A. No, we do not.

Q. You do not?

A. No.

MR. MCKELVY: That is all.

THE COURT: I believe you said that you do not believe that that is a proper procedure. Is that right?

THE WITNESS: Yes" (Tr. 1956-1957).

C. J. Hopkins, logging manager for the Peninsula Plywood Company operating on the Olympic Peninsula, testified that his company does not burn slash in the Olympic Peninsula area (Tr. 473). Some of his company's lands were burned over by the fire of September 2 0(Tr. 4360).

All parties, including the Government and the State, had slash on their lands between the 1600-acre area and Forks. Government officials at times have differences

about slash burning (Tr. 4219-4221). The State had approximately 1,000 acres of unburned slash between the 1,600 acre area and Forks over which the September 20 fire burned (McDonald Tr. 1781). The State didn't always burn its slash (Tr. 1783).

Slash in the North half of the South half of Section 31 consisted mainly of small logs, but did not contain limbs, small pieces of material or dried needles (Edward Drake, Forest Service employee, Tr. 1526). Fibreboard had felled approximately one and one-half to two million feet of snags in Section 31 prior to 1951 (Tr. 2087). There was Rayonier unburned slash between the 1,600 acre area and Forks (Tr. 2897). Appellant's expert, Harold Jones, described himself as a "non-slash burner" (Tr. 2910). Rayonier burned no slash (Floe, Tr. 3463). Fibreboard had previously experienced uncontrolled slash fires after being requested by the authorities to burn slash (Tr. 2092-3-4). The United States had had several uncontrolled slash fires on its land in the area covered by the cooperative agreement during the few years before 1951 (Tr. 904). Floe told Fibreboard to burn slash in 1945. That fire went out of control (Tr. 2092). Fibreboard had trouble with slash fire requested by State in October, 1952 (Tr. 2101). Clearance certificates are never granted authorities unless requested by land owner or operator (Tr. 4430). The clean-up by Fibreboard during logging operations in Sections 31, 32 and 33 was good (Floe, Tr. 899).

Appellant Arnholds' Authorities Pertaining to Existence of Slash

The case of *Great Northern Railway v. Oakley,* cited at page 55, appellant Arnholds' brief, 135 Wash. 279, 237 Pac. 990, was decided before the change in the statute referred to in which the word "nuisance" was deleted and, therefore, has no application in the instant case. The cases of *Theurer v. Condon,* 34 Wn.(2d) 448, 209 P.(2d) 311, and *Pig'n Whistle Corp. v. Scenic Photo Co.,* 55 F.(2d) 854, cited on page 56 of appellant Arnholds' brief, involved direct violation of the respective ordinances therein referred to. In the *Theurer* case there was an installation made in violation of a fire ordinance in that an oil tank was located less than the required minimum of 3 feet from the range, which violation resulted in a fire. In the *Pig'n Whistle* case, the defendant had used a ventilation shaft as a grease film duct in direct violation of a city ordinance.

In *Spokane International Ry. Co. v. United States,* 72 F.(2d) 440, there was evidence that the defendant violated an Idaho statute which provided that it should keep its right of way "clear and free from all combustible and inflammable material, matter or substances." The court held that the statutory requirement was reasonable, not impossible of fulfillment, and merely required the removal of cheat grass from its right of way.

The court said:

> "Although the statute should not be construed to impose on defendant a standard of care impossible

> of fulfillment, there is nothing to show that this cheat grass could not have been removed."

Obviously, this is not in point in the instant case where the record abounds with testimony that it is poor policy to burn slash; that there is more danger involved in burning slash than to allow it to deteriorate and where the record indisputably shows that whether or not a chance of burning slash should be taken must depend upon discretion and judgment and the surrounding circumstances and where a preponderance of the testimony shows that it is a better policy to refrain from burning slash. Fibreboard could not have safely burned the slash in Section 31.

The case of *Browning v. Slenderella Systems of Seattle,* 154 Wash. Dec. 586, 341 P.(2d) 882, cited on page 56 of appellants' brief, as holding that a civil action may arise from a statute criminal in form has reference to a situation where the violation of the statute is necessarily "a wrong against the individual" involved. In that case the defendant refused to render services to the plaintiff because of race and color. This should not be likened to the slash statute in question allowing only the State to recover for fire fighting costs.

Remington's 76.04.370 does not set up a standard or measure of care and at most the duty is that of a reasonable man under the circumstances. Surely in an action brought by the State to recover fire fighting costs the defendant would be permitted to show that the setting of a slash fire would have created a greater fire hazard than to allow the slash to remain. The trial court's find-

ing that there was no negligence in this regard is abundantly supported by the record.

In any event the evidence clearly shows and the trial court found that the sole proximate cause of the incident complained of was the unforeseeable and fortuitous combination of wind and weather conditions. Even if we should assume *arguendo* that, as contended by the appellants Arnhold, there was a violation of the forest protection statutes which was negligence *per se,* such alleged negligence was not the proximate cause of the September 20 fire.

CONCLUSION

The Forest Service, pursuant to the "cooperative agreement" with the State of Washington authorized by RCW 76.04.400, assumed control of the fires complained of and proceeded to take "immediate vigorous action." The testimony of the Forest Service personnel bordered on praise of Fibreboard's action and cooperation in connection with these fires (Tr. 4074-4079). Fibreboard could not be expected to know more or even as much as the expert fire fighting organization of the United States. The Forest Service was the most highly skilled forest fire organization in the country (Tr. 1624).

Fibreboard followed the usual and customary practice in connection with its conduct and activities in the period in question. We think that a fair inference could be drawn from the evidence that so far as the Government is concerned, it felt that Fibreboard went beyond the call of duty so far as its activities and cooperation

were concerned. It acted prudently and refrained from burning slash that would have created a hazard to the forest. It was never served with a notice to abate the slash in Section 31, probably for reasons heretofore discussed. Fibreboard was completely satisfied with the conduct of the Forest Service. It could not be expected to have questioned the Forest Service activities during the period of the fires. Fibreboard's manager, Mr. Hartnagel, said that Fibreboard had no criticism of the Forest Service activities (Tr. 4425). As pointed out by the trial court, it is difficult to view the services rendered by the Government without indulging in hindsight reasoning as distinguished from decisions that were necessarily made on the ground.

If experts such as were employed by the Forest Service and other experts who testified at the trial could not anticipate the fortuitous event of September 20, certainly it is unreasonable to say that Fibreboard was negligent in not doing so.

> "Precaution is a duty only so far as there is reason for apprehension."
>
> *Smith v. Boston & M. R. R.,* 87 N. H. 246, 177 Atl. 729.

To be free from negligence a man is not legally bound to safeguard against occurrences that cannot reasonably be expected or contemplated.

> *Hanson v. Washington Water Power Co.,* 165 Wash. 497, 5 P.(2d) 1025.

It is not negligence of a man of science to make a mis-

take if he has brought to bear a reasonable degree of skill and care.

> *Howatt v. Cartwright,* 128 Wash. 343, 22 Pac. 496;
>
> *Jordan v. Skinner,* 187 Wash. 617, 60 P.(2d) 697;
>
> *Smith v. Beard,* 56 Wyo. 375, 110 P.(2d) 260.

The rule is well expressed in an old admiralty case, *The Tom Lysle,* 48 Fed. 690 (D.C.W.D. Penn.).

> "The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances in connection with the duty he is about to perform and, bringing to bear all his professed experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience, or skill which he professes then a failure, if caused thereby, would be negligence. 'No one can be charged with carelessness, when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty, may be called his mistake, but not carelessness.' *Brown v. French,* 104 Pa. St. 604; *Williams v. LeBar,* 141 Pa. St. 149, 21 Atl. Rep. 525."

The doctrine so aptly expressed in the foregoing quotation may be pertinent to the Government's case.

In any event, it has greater significance when applied to Fibreboard's situation for the reason that to hold Fibreboard negligent in failing to detect any alleged inadequacies of the Forest Service fire fighting activities would be to say that Fibreboard was called upon to outguess the experts.

The September 20 Forks fire "happened fortuitously" (R. 203) and on the same day that other large fires occurred in western Washington. Significantly, one of appellants' expert witnesses, Mr. Cowan, Manager of the Washington Forest Fire Association, in referring to the Forks fire of September 20, 1951, in the annual report of the Washington Forest Fire Association for 1951 (Exhibit 171) said among other things, "We attach no blame . . ." (Tr. 2462).

The trial court had the opportunity to judge of the credibility of the witnesses and the weight to be given to the evidence. The trial judge availed himself of the very valuable opportunity of viewing the rugged terrain where the fires occurred. This view was made before listening to the testimony. The trial court's findings absolving Fibreboard of all negligence are obviously not "clearly erroneous" but are abundantly supported by the preponderance of the evidence. It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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